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No. 80-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

CURTISS-WRIGHT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Statement of Questions Presented

Where two private corporations entered into a series of contracts expressly governed by New York law, did the District Court err in applying New York law and in holding that under New York law, once suit had been instituted a contractual term concerning the release of claims did not preclude the court from entering partial summary judgment in that ongoing suit for the balance of the contract price for goods sold, delivered and accepted.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Curtiss-Wright Corporation, respectfully requests that this Court deny the petition for a Writ of Certiorari seeking review of the Thir d Circuit's affirmance of partial summary judgment entered by the District Court in this case. The Judgment Order of the Third Circuit was entered on July 3, 1980 without opinion, 624 F.2d 1089, and appears in the Appendix to the Petition for Writ of Certiorari (App. 1a). The opinion of the District Court on the entry of partial summary judgment was filed on

December 5, 1977 and is unreported (App. 2a-9a). The case was before the Third Circuit upon remand from this Court. *Curtiss-Wright Corp.* v. *General Electric, Co.*, No. 79-105 (April 22, 1980), —— U.S. ——, 100 S. Ct. 1460, wherein this Court ruled that the District Court's Rule 54(b) certification was proper and should have been sustained on appeal.[1]

Counter-Statement of the Case

Between June 1968 and December 1972 Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 contracts with the General Electric Company ("GE"), a prime contrator for the United States Navy. These contracts called for Curtiss-Wright to manufeture and deliver 167 large components designed for use in nuclear powered naval vessels. Each of the contracts contained the following provision:

> "[Article] 22.—APPLICABLE LAWS—This order shall be governed in all respects by the laws of the State of New York." (S.Ct.App. 131a).[2]

In connection with the 21 contracts Curtiss-Wright brought suit against GE pursuant to the District Court's diversity jurisdiction seeking damages and reformation of the contracts.[3] Concurrently with the suit, Curtiss-Wright

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[1] The Third Circuit originally dismissed the appeal and vacated the Rule 54(b) final judgments entered in respondent's favor. 597 F.2d 35, *rehearing denied*, 599 F.2d 1259 (3d Cir. 1979).

[2] (S.Ct. App.) references are to the Appendix filed in this Court in No. 79-105.

[3] GE interposed counterclaims which are not relevant here.

also sought payment from GE of $18,914,408, approximately 10 percent of the contract price which GE was withholding although Curtiss-Wright had completed the manufacture and delivery of all components. As to this unpaid amount GE took the position that a certain contractual provision known as Article 5c required Curtiss-Wright to release GE and the Government from all claims including those claims then in suit before Curtiss-Wright was entitled to the outstanding balances.[4] Negotiations between the parties eventually proved fruitless even though GE recommended to the Navy that Curtiss-Wright be paid because of the "continuing likelihood that [Article 5c] as was being enforced could be found to be unconscionable or otherwise unenforceable."[5] In this regard GE's own personnel had concluded that the withholding of the contract balances was being used as a "club" to force Curtiss-Wright to release its claims then in suit.[6]

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[4] "[Article 5c.] Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer [G.E.] and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order [subcontract]. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price" (App. 15a).

[5] Letter from E. F. Phelps (GE) to H.A. Cardinali (Navy) dated July 14, 1976. (Ct. of App. Appendix at 152).

[6] Memorandum of F.J. Balicki (GE) to E.F. Phelps (GE) dated June 22, 1976:

> "With the advent of the [Curtiss-Wright] civil action, MAO [GE], for the first time in my recollection, is faced with withholding monies in the face of a substantial claim.

(Footnote continued on following page)

Thus Curtiss-Wright amended its complaint, adding counts which sought to recover the balance of the price for goods sold, delivered and accepted. It then moved for summary judgment on those counts.

GE's basic defense to the motion was that Article 5c required the release of all Curtiss-Wright claims prior to final payment under the contract.[7] Although the parties disagreed as to the legal effect of Article 5c they did agree that the question was one to be determined under New York law, and the District Court so ruled (App. 4a).

(Footnote continued from preceding page)

> This civil action brings to light a dimension to withholding heretofore not recognized in most MAO people: i.e., use of withholding monies to either prevent claims or cause the Seller, due to the amount of the withholding, to capitulate his claims position and grant release to the Prime [Contractor]."
>
> * * *
>
> "[I]t is my judgment that ANSTR [Navy] is withholding monies to lever/present/dismiss vendor claims" (Ct. of App. Appendix at 165-66).

Memorandum of Roberts (GE) to Balicki (GE) dated June 18, 1976:

> "There is nothing wrong with contracting parties agreeing to a withholding clause provided that its purpose is mutually understood and is a reasonable amount that prudent business could accept. I can accept the principle of precipitating timely redetermination or insurance of performance; however, I cannot agree in any way that it is a built in club to preclude a legitimate claim or force the withdrawal of a claim submitted" (Ct. of App. Appendix at 148).

[7] GE also maintained that Curtiss-Wright had not completed performance on certain minor aspects of some of the contracts. These matters, however, were resolved while the motion was pending and are not relevant here.

On the merits, the District Court held that under New York law Article 5c was not a bar to the entry of partial summary judgment in Curtiss-Wright's favor and entered appropriate orders of final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. On July 3, 1980, the Third Circuit Court of Appeals affirmed the District Court by Judgment Order,[8] and on July 28th denied GE's motion for a stay of its mandate pending a petition for certiorari to this Court.[9] Petitioner sought a stay of execution under Fed. R. Civ. P. 62(h) but its request was denied by the District Court,[10] and, more than 2½ years after the District Court's decision, GE paid to Curtiss-Wright the judgments representing the balance of the contract price plus interest.

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[8] Before the Third Circuit, GE likewise took the position that "New York law governs the merits of the question presented by the parties' Motions for Summary Judgment." Brief for Appellant at 18 n.14.

[9] This was the second time the case came before the Third Circuit. On the first occasion the court held that the district court had improperly entered final judgments under Rule 54(b). Judge Rosenn, in dissent, reached the merits of the summary judgment motion and concluded that the District Court had correctly applied New York law to the facts of this case. *Curtiss-Wright Corp.* v. *General Electric Co.*, 597 F.2d 35, 36, 40 (3d Cir. 1979), *rehearing denied*, 599 F.2d 1259 (3d Cir. 1979). This Court then reversed the Court of Appeals on the Rule 54(b) question thus placing the merits of the summary judgment motion once again before the Third Circuit. *Curtiss-Wright Corp.* v. *General Electric Co.*, —— U.S. ——, 100 S.Ct. 1460 (April 22, 1980).

[10] By Order dated August 29, 1980.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The only issue presented by this case is one of contract interpretation under state law, and there are no grounds which make this case appropriate for review by this Court.

In the Court of Appeals below petitioner expressly stated that "the District Court correctly held that New York law governs the merits of the questions presented by the parties' Motions for Summary Judgment."[11] Nevertheless, the fact that the sole question involved in this case is one of New York law has been artfully obscured in GE's petition.

In its statement of Reasons for Granting the Writ, GE, ignoring the contracts' New York choice of law provision[12] takes issue by innuendo with the fact that the District Court below properly confined its analysis to a question of New York contract law interpretation. GE does so by contriving a specious "federal question" in this case based merely upon the irrelevant fact that the items manufactured by Curtiss-Wright were ultimately intended for government use.[13] In addition GE contends that the decision below is somehow inconsistent with prior Supreme Court decisions. There is, however, no inconsistency with the prior decisions of this Court.

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[11] *See* note 8, *supra*.

[12] This provision is one which GE included in all of its contracts with Curtiss-Wright.

[13] The fact that government funds are ultimately used to pay for the components manufactured by Curtiss-Wright is an obviously insufficient basis for granting the petition. Under GE's erroneous reasoning every money judgment against the government would be entitled to Supreme Court review.

The narrow issue presented by this appeal involves the application of New York law to a contractual provision concerning the withholding of final payment and release of claims. The Supreme Court decisions cited by GE, however, are for the most part government contract cases originating in the Court of Claims.[14] None were based on New York law or involved a constitutional decision that would overrule the New York law applied in this case.[15]

It is well settled that the Supreme Court generally does not review state law questions. *Butner* v. *United States*, 440 U.S. 48, 58-9 (1979); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596 (1959); *United New York and New Jersey Sandy Hooks Pilot Assoc.* v. *Halecki*, 358 U.S. 613, 615 (1959); *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-8 (1949); *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944); *cf. Bishop* v. *Wood*, 426 U.S. 341, 344-7 (1976). Indeed, the recently revised Supreme Court Rules no longer set forth as appropriate for review on certiorari cases where a federal court "has decided an important state or territorial

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[14] Lest there be any doubt, the Government is not a party to any of the contracts involved here which, in fact, expressly provide: "This order does not bind nor purport to bind the United States government, its officers, employees or agents." (S.Ct. App. 100a).

[15] *United States* v. *Moorman*, 338 U.S. 457 (1950); *United States* v. *Wunderlich*, 342 U.S. 98 (1951); *United States* v. *Standard Rice Co.*, 323 U.S. 106 (1944); *United States* v. *William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118 (1907); *Sweeny* v. *United States*, 109 U.S. 618 (1883); and *Kihlberg* v. *United States*, 97 U.S. 398 (1878) originated in the Court of Claims and did not involve state law. *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) was an admiralty law case. *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969), originated in the California court but involved an issue linked to patent law. *D.H. Overmeyer Co.* v. *Frick*, 405 U.S. 174 (1972) determined the constitutionality of cognovit notes, a subject matter not involved here.

question in a way in conflict with applicable state or territorial law." *Compare* Supreme Court Rule 17.1 *with* superseded Rule 19(1)(b).[16] One pair of commentators notes:

> "[The] deletion [of such cases] suggests, at the least, a diminished interest on the Court's part in reviewing diversity of citizenship cases where the only issue is an alleged conflict wtih applicable state law."

B. Boskey & E. Gressman, *The Supreme Court's New Rules for the Eighties*, 85 F.R.D. 487, 505 (1980).

Even before this change in the Supreme Court Rules, the court reviewed state law questions only if it concluded that the Court of Appeals interpretation of state law was clearly wrong. *The Tungus* v. *Skovgaard, supra*, 358 U.S. at 596. Contentions that an independent review by the Supreme Court might produce a different result were insufficient to obtain review on Writ of Certiorari. *Bishop* v. *Wood, supra*, 426 U.S. at 346-7.

Here, the District Court relied on the most recent New York case on point, which, it should be noted, was affirmed by New York's highest court,[17] and, it cannot be said that

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[16] The other grounds set forth in Rule 17.1 for the granting of certiorari are also inapplicable here. There is no conflict among the courts. Rule 17.1(a). There has been no decision by a state court of last resort. Rule 17.1(b). There has been no decision concerning an important question of federal law. Rule 17.1(c).

[17] The District Court ruled that the case was controlled by *Tufano Contracting Corp.* v. *Port of New York Authority*, 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 App. Div. 2d 832, 237 N.Y.S. 2d 562 (1963), *aff'd.*, 13 N.Y. 2d 967, 194 N.E.2d 603, 244 N.Y.S.2d 643 (1963), *discussed at* pp. 12 to 17 *infra*.

(Footnote continued on following page)

the District Court so clearly misapplied state law as to warrant review by this Court.[18] Nor are there any other grounds mandafing this Court's involvement in the narrow issue presented, *i.e.*, the legal significance of Article 5c under New York law. The actual foundation of GE's petition is GE's dissatisfaction with the result under New York law reached below. Such dissatisfaction, however, is no basis for review by this Court on Writ of Certiorari.

2. The Supreme Court cases cited by petitioner are neither apposite to nor inconsistent with the New York law relied upon by the District Court in this case.

United States v. *William Cramp & Sons Ship & Engine Bldg Co.*, 206 U.S. 118 (1907), cited by GE, is not inconsistent with the decision by the District Court in this case. First, *William Cramp* is not even apposite since it is a case decided under general federal law—not New York law. Second, the case is factually distinguishable from the pres-

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(Footnote continued from preceding page)

Since the District Court relied on an authoritative statement of New York law affirmed by New York's highest court, it cannot fairly be said that the District Court engrafted a special exception onto New York law. Therefore, the cases cited by petitioner, while correct in their statements of the general law, are not appropriate in this case. *E.g. Day & Zimmerman, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959); *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940). In fact, in *Day & Zimmerman, Inc.* v. *Challoner, supra* the lower courts did not apply state law at all.

[18] Indeed, Respondent submits that the District Court's application of state law was eminently correct. *See* the discussion at pp. 12-17, *infra*.

ent one. In *William Cramp* the ship building company, after being given the opportunity to renegotiate its contract to obtain additional funds, *delivered a general release* and obtained final payment. *Three years later,* it brought suit for additional reimbursement. The Supreme Court dismissed this action *because the contractor had given the release.* Here, Curtiss-Wright neither gave a general release nor accepted final payment under the contract prior to filing suit.[19]

The remaining Supreme Court cases cited by petitioner do nothing more than articulate basic contract principles in various contexts not in any way relevant to New York law, the effect of "release" clauses or the withholding of contract balances.[20] These cases therefore are neither consistent nor inconsistent with this case. They are simply inapposite.

3. The petition raises issues both irrelvant to the opinion below and unsupported by the record.

Petitioner contends that this case is one of "general importance" for two reasons. First, it contends that the decision below "flouts the public policies favoring prompt raising and resolution of disputes under Government contracts. . . ." (Petition at 7).

Assuming the existence of such a public policy, it is clearly not involved here. The issue presented to and decided by the District Court was not whether Curtiss-Wright had raised its claims in an untimely manner. The issue

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[19] As the District Court below noted, these differences are crucial under New York law (App. 6a).

[20] These cases are cited in note 14, *supra.*

was whether Article 5c—regardless of when Curtiss-Wright instituted suit or otherwise made claims—barred the entry of summary judgment. Article 5c by its very terms is concerned only with the question of release of claims. It is not, either expressly or impliedly, concerned with the time in which claims must be presented. In fact, there is no general "disputes" clause in any of the contracts involved here nor is there any other contractual mechanism concerning the timing or resolution of the types of claims which are embodied in the Complaint in this action. The fact that GE sought to justify the withholding of final payment on the basis of its unilateral determination that Curtiss-Wright had delayed too long in instituting suit raised at most an issue collateral to the disposition of the summary judgment motion and was nothing more than an attempt by GE to lay a smokescreen over its otherwise untenable position.

GE also contends that the result below will have an adverse impact upon outstanding contracts in the Navy Nuclear Program. There is, however, absolutely nothing in the record which supports this contention. In the courts below, GE made no effort to demonstrate the impact which the result in this case has had or might have on outstanding contracts.[21] Nor is there any indication that any subcontractor has even filed a claim of any type against GE in the 2½ years since the District Court rendered its opinion. In any event, it is difficult to fathom what effect, if any, the decision below will have upon other contractors

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[21] It should also be noted that although the Petition states that there are $975 million worth of outstanding Navy subcontracts affected by the District Court's opinion, it is unclear whether this figure excludes those contracts placed by Westinghouse, the other major prime contractor for the Navy. Contracts placed by Westinghouse are subject to the laws of Pennsylvania rather than the laws of New York.

who may wish to assert claims against GE. Speculation as to some ill-defined impact upon outstanding subcontracts hardly justifies the issuance of a Writ of Certiorari.[22]

It should also be noted that the District Court decision of which GE now complains was rendered on December 5, 1977, nearly three years ago. Clearly, GE was on notice as to all contracts into which it entered after that date that a court had interpreted the relevant contractual provision in a way unsatisfactory to GE. GE is silent as to what steps if any it has taken since December 5, 1977 to change the language of subsequent contracts. If GE continued to enter into contracts identical to the ones involved in this case it obviously did so at its own peril. In any event, the record below provides GE with no basis upon which to petition this Court.

4. The District Court correctly held that under New York law Curtiss-Wright was entitled to partial summary judgment without waiving its additional claims against GE.

The District Court held that under New York law, (1) Curtiss-Wright was entitled to summary judgment on its claims for payment under the 21 contracts, (2) execution on this judgment by Curtiss-Wright would not constitute "final payment" under Article 5c of the Terms & Conditions of Purchase[23] and (3) accordingly, the release pro-

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[22] The Court of Appeals below rejected basically the same arguments made in GE's petition when it denied GE's motion for a stay of that court's mandate.

[23] The text of Article 5c is set forth in the Counterstatement of the Case at p. 3 n.4, *supra*.

visions of Article 5c would not operate as a bar to Curtiss-Wright's assertion of its additional claims against GE. In so holding, the District Court correctly ruled that the case was controlled by *Tufano Contracting Corp.* v. *Port of New York Authority*, 33 Misc.2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 App. Div. 2d 832, 237 N.Y.S. 2d 562 (1963), *aff'd*, 13 N.Y. 2d 967, 194 N.E. 2d 603, 244 N.Y.S. 2d 643 (1963).

In *Tufano*, the plaintiff-contractor completed work on a Port Authority contract which provided that acceptance of final payment on the contract would operate as a release by the contractor of all other claims arising out of the contract. 33 Misc. 2d at 1029, 227 N.Y.S. 2d at 708. Rather than accept final payment under the contract, the contractor brought suit for both the balance of the contract price and for additional claims arising from work performed under the contract. *Id.* at 1028, 227 N.Y.S. 2d at 708.

When the contractor moved for partial summary judgment on the balance of the contract price without prejudice to its other pending claims, the Port Authority argued, as GE here similarly argues, that "judgment for plaintiff could be given at this time only by ignoring the plain provisions of the contract in suit to the effect that acceptance by plaintiff for final payment operates as a release. . . ." *Id.* The trial court rejected this defense and ruled that the contractor was entitled to recover the balance of the contract price by moving for partial summary judgment without awaiting the disposition of its other claims. The Court held:

> "While the above-quoted release clause is valid and will be enforced where a contractor has accepted final payment (Cauldwell-Wingate Co. v. City of New York, 269 N.Y. 539, 199 N.E. 684; Nicholas v. City of New York, 293 N.Y. 704, 56 N.E. 2d 587), in

> the case at bar, final payment was not accepted but to the contrary was refused when tendered by defendant. In the opinion of the court *plaintiff did not contract away its right to sue for sums which it had earned and the release clause nowhere prescribes the time when judgment may be entered after such action is brought. Nor does the court consider judgment on the first cause of action to be final payment under the release clause of the contract. . . .*" Id. at 1029, 227 N.Y.S. 2d at 708-09 (emphasis added).

In affirming the decision of the trial court, the New York Appellate Division in *Tufano* expressly affirmed the lower court's holding that: "[P]laintiff's acceptance of payment, pursuant to . . . partial summary judgment . . . cannot be deemed the equivalent of a vountary acceptance of payment under the 'final payment' clause. . . ." 18 App. Div. 2d at 833, 237 N.Y.S.2d at 563. The New York Court of Appeals affirmed. 13 N.Y.2d 967, 194 N.E.2d 603, 244 N.Y.S.2d 643 (1963).

In the present case, the District Court correctly held that the operative language of Article 5c—"[the parties] agree as a condition precedent to final payment, that the Buyer and the Government . . . are released . . ."—has the same legal significance as the "strikingly similar" release clause in *Tufano*, *i.e.*, (1) a release of claims will result only from acceptance of final payment under the contract and (2) a judgment entered by a court is not final payment under the contract. Because Curtiss-Wright had not accepted final payment under the contract, Article 5c did not operate to release Curtiss-Wright's additional claims as set forth in the Complaint. And, since under New York law summary judgment is not final payment under the contract, execu-

tion on that judgment could not operate as a release of claims.[24] (App. 6a-9a)

Since *Tufano*, the New York courts have consistently and as a matter of routine entered judgments on contractors' claims for outstanding contract payments while permitting the contractors to litigate any additional claims, despite the existence of a "release" clause. *See, e.g., Terry Contracting, Inc.* v. *State*, 23 N.Y. 2d 167, 243 N.E. 2d 125, 295 N.Y.S. 2d 897 (1968); *Byrne Construction Co.* v. *New York State Thruway Authority*, 19 App. Div. 2d 192, 241 N.Y.S. 2d 58, *motion for leave to appeal denied*, 13 N.Y. 2d 598, 244 N.Y.S. 2d 1025 (1963); *A. E. Ottaviano, Inc.* v. *State*, 52 Misc.2d 998, 277 N.Y.S. 2d 538 (Ct. Cl. 1967), *aff'd*, 32 App. Div. 2d 87,299 N.Y.S. 2d 938 (1969).[25] Thus in *Terry Contracting, Inc.* v. *State, supra*, the New York Court of Appeals noted that the

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[24] GE contends that the District Court's interpretation of Article 5c did not give proper effect to the words "condition precedent" in said paragraph. It is clear, however, that the Court's interpretation of the words ". . . condition precedent . . . that the Buyer and the Government *are* released . . ." (emphasis added) as effectuating a release upon final payment comports with the plain meaning of those words. To the extent that the language of Article 5c is in any way ambiguous, under New York law it must be resolved against the party drawing the language, *i.e.*, General Electric (A. 93). *See, e.g., Goldfield Corp.* v. *General Host Corp.*, 29 N.Y. 2d 264, 272, 277 N.E. 2d 387, 392-93, 327 N.Y.S. 2d 330, 337 (1971); *Janos* v. *Peck*, 21 App. Div. 2d 529, 533, 251 N.Y.S. 2d 254, 259, *aff'd.*, 15 N.Y. 2d 509, 202 N.E. 2d 560, 254 N.Y.S. 2d 115 (1964).

[25] The only point at issue in these cases was whether the contractor was entitled to prejudgment interest. In the present case, the District Court in a subsequent opinion concluded that under New York law respondent was entitled to prejudgment interest, and GE did not appeal this point.

claimant had refused tender of final payment "because of a contract provision to the effect that acceptance of final payment would constitute a waiver of all additional claims, and instead, filed a claim against the State for the contract balance and for the items which are the subjects of the remaining causes of action. The cause of action for the contract balance was severed and a judgment was entered and paid in full for the amount on that balance. . . ." 23 N.Y. 2d at 171-72, 243 N.E. 2d at 126, 295 N.Y.S. 2d at 898.

GE cites no case subsequent to *Tufano* where a contractor who had neither accepted final payment prior to suit nor delivered a release has been barred by a "release clause" from instituting suit to recover the balance of contract price without prejudice to additional claims. In fact, the New York courts have clearly indicated that once the contractor initiates litigation to recover the outstanding contract balance the courts will not permit the party holding these funds to assert as a defense a contract provision such as Article 5c. For example, in *Terry Contracting, Inc.* v. *State, supra,* the New York Court of Appeals noted that a contractor who was compelled to waive all additional claims as the price for recovering the balance of the contract price "was thus faced with an essentially unfair choice." 23 N.Y.2d at 173, 243 N.E.2d at 126, 295 N.Y.S.2d at 899. And in *Byrne Construction Co.* v. *New York State Thruway Authority, supra,* the Appellate Division indicated that the New York courts would view as "much too harsh" a contractual requirement which would compel a contractor to waive its additional claims for the price of accepting final payment. 19 App. Div. 2d at 193-94, 241 N.Y.S.2d at 60. Thus New York law clearly permits a contractor, despite a provision such as Article 5c, to bring suit for the

balance of the contract price along with any additional claims and to recover the former on a motion for partial summary judgment without prejudice to the additional claims.[26]

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[26] The invoicing instructions cited by GE in the Petition (but not cited in the District Court) regarding final payment under the contract are thus inapplicable under New York law when as here, the subcontractor, in lieu of accepting final payment under the contract, brings suit for the balance of the contract price and for additional damages.